UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v. **Case No. 8:03-CR-77-T-30TBM**

HATEM NAJI FARIZ
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RESPONSE TO THE GOVERNMENT'S RENEWED MOTION AND MEMORANDUM IN SUPPORT OF MOTION TO EXCLUDE EXPERT TESTIMONY OF ILAN PAPPE AND RAJI SOURANI, OR IN THE ALTERNATIVE, FOR A DAUBERT HEARING

Defendant, Hatem Naji Fariz, by and through undersigned counsel, respectfully submits this Response to the government's Renewed Motion and Memorandum of Support of Motion to Exclude Expert Testimony of Ilan Pappe and Raji Sourani, or in the Alternative, for a Daubert Hearing (Doc. 1365). Mr. Fariz states:

Introduction

Mr. Fariz contends that the government's motion should be denied, since, as discussed in more detail below, both Ilan Pappe and Raji Sourani meet the standards for expert testimony.[1] In addition, their proposed testimony is relevant and not cumulative, since the testimony that Mr. Fariz intends to elicit concerns issues and further details about which the government has presented testimony and other evidence during trial. Indeed, while the government repeatedly cites to this Court's order regarding the government's pretrial motions

[1] Attached for the Court's review are the CV's of both Prof. Pappe and Mr. Sourani which were previously provided to the government on April 25, 2005.

in limine, the government fails to recognize that it has opened the door to testimony that more completely and accurately describes the context and details of matters at issue in this trial.

ARGUMENT

I. Standard of Admissibility for Expert Testimony

The admission of relevant expert testimony is governed by Federal Rule of Evidence 702. Federal Rule of Evidence 702 provides that:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702.

Phrased another way, the Court must engage in an inquiry consisting of three basic requirements. *United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004). These three requirements are whether:

> (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and, (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.

Id.

First, as to qualifications, an expert may be qualified based only on experience. Fed. R. Evid. 702 advisory comm. notes. As the advisory committee noted, "[i]n certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony." *Id.* (citing, as examples, law enforcement officers, handwriting examiners and design engineers).

The second requirement of reliability calls for a similarly flexible evaluation. *Frazier*, 387 F.3d at 1262. No single factor may determine reliability, and a reliable contradictory theory does not make the other theory less reliable. Fed. R. Evid. 702 advisory comm. notes. Rather, the focus must be on "principles and methodology," not conclusions. *Id.*

The last factor, relevance, refers to the likelihood that the expert testimony will assist the trier of fact. *Frazier*, 387 F.3d at 1262. This broad factor merely refers to whether the testimony "concerns matters that are beyond the understanding of the average lay person." *Id.* (citing *United States v. Rouco*, 765 F.2d 983, 995 (11th Cir. 1985)).

In determining these factors, the exclusion of an expert's testimony is "the exception rather than the rule." Fed. R. Evid. 702 advisory comm. notes. "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Id.* (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 595 (1993)).

II. The Expert Testimony of Pappe and Sourani Meet These Standards

The government objects to the testimony of both Prof. Pappe and Mr. Sourani as overtly political and biased. That a witness may present testimony inconsistent with the government's preferred theory does not make that testimony unreliable or impermissibly biased.[2] The testimony of Prof. Pappe and Mr. Sourani will instead be offered to provide a more complete and accurate context of the issues that have been presented to the jury.[3]

A. Ilan Pappe

1. Qualifications

The government alleges that Prof. Pappe is not qualified to render expert testimony regarding the Palestinian Islamic Jihad, Hamas, or other "Islamist rejectionist terrorist groups." It bases its contention on the fact that hundreds of entries on the website search engine Google include no entries about the PIJ or Hamas. As a political scientist and historian actively engaged in the research and analysis of the Palestinian-Israeli conflict for the last 30 or so years, Prof. Pappe is uniquely qualified to offer testimony on the PIJ and Hamas. In addition, in Prof. Pappe's survey book, A History of Modern Palestine (Cambridge University Press 2004), he discusses Hamas, the Palestinian Islamic Jihad, and the historical figure Sheikh Izz al-Din Al-Qassam. Also, Prof. Pappe's latest book, The

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[2] Remarkably, the government presented as its expert Matthew Levitt, a recent Ph.D, who is employed by an organization that was started by a former leader of the American-Israel Public Affairs Committee (AIPAC), the top pro-Israel lobby in this country.

[3] Mr. Fariz addresses the standards for the admission of expert testimony as set forth in *Frazier*, and therefore does not address these standards in the same order as the government.

Modern Middle East (Routledge 2005), contains several chapters about political Islam and its various movements all throughout the Arab and Muslim world, including in no small part Palestine. Crucially, what the government leaves out in its motion is the fact that Mr. Fariz provided it with an exhaustive CV for Prof. Pappe, which referenced literally dozens of peer-reviewed books and articles he has authored, and prefers instead to report to the Court on the results of a superficial internet search.[4] These articles include, among others, "Understanding the Enemy: A Comparative Analysis of Palestinian Islamist and Nationalist Leaflets, 1920s-1980s." Finally, as his summary of expert testimony makes clear, Prof. Pappe is one of the world's leading experts on the Arab-Israeli conflict, which by its very nature includes Palestinian Islamist movements like the PIJ and Hamas.

2. Reliability

As a tenured professor at one of Israel's leading universities and a frequent lecturer at leading American universities, such as Harvard, Princeton, Columbia, and Berkeley, it is clear that Prof. Pappe employs reliable and sound methodology in producing the writings cited in his CV, which are subject to peer review and revision. As noted, Prof. Pappe is the

[4]The government additionally complains that the expert summaries for Prof. Pappe and Mr. Sourani are inadequate because they lack footnotes. Mr. Fariz would note that on the day it called its own expert, Matthew Levitt, to testify, the government surprised the defense with several new individuals it wished to cover that were not included in Dr. Levitt's summary of expert testimony: Omar Abdel-Rahman, Khalid Al-Islambuli, and Al-Sayyid Nosair. By way of contrast, the undersigned did not object to Dr. Levitt's ability to opine on these individuals, since anyone with familiarity in the modern Middle East and political Islam would recognize these names, but rather objected on the basis of Federal Rules of Evidence 401 and 403. The Court allowed testimony on Al-Islambuli and Al-Nosair, but excluded testimony on Abdel-Rahman on Rule 403 grounds. *See* Motion in Limine Transcript, June 21, 2005 (Doc 1335 at 26-27).

author of pioneering studies of the Arab-Israeli conflict and was among the first historians to make extensive use of the Israeli state archives. This is in marked contrast to Dr. Levitt, whose only book is a 134-page monograph issued by his employer, the Washington Institute for Near East Policy.

Further, in addition to being a native Hebrew speaker, Prof. Pappe is fluent in both Arabic and English, and therefore has the ability to personally review Arabic sources in their original language, without resort to a translator. In comparison, Dr. Levitt cannot speak Arabic. Therefore, if the government really has questions about Prof. Pappe's methodology, it can properly inquire as to the materials he is relying on during voir dire in front of the jury.

3. Prof. Pappe's Proposed Testimony is Relevant, Helpful to the Jury, and not Cumulative

The government alleges in summary fashion that Prof. Pappe's proposed testimony is either irrelevant, not helpful to the trier of fact, expressly precluded by the Court's May 10, 2005 ruling, or all of the above. Mr. Fariz addresses each topic of the proposed testimony in turn below.

1948 War and Subsequent Developments

As one of the historians who authored the groundbreaking work on the origins of the state of Israel, Prof. Pappe is uniquely placed to testify on this issue, particularly in light of the government's theory of extortion. In this case, the government has alleged that the PIJ is attempting to extort the land of Israel from its inhabitants and those entities and individuals owning land there. While Mr. Fariz believes that what is being alleged is non-extortable

sovereignty, to counter the government's claims, he should be entitled to present testimony regarding the status of the land, the legal claims of Palestinian refugees to that land (which are buttressed by a fully valid United Nations General Assembly Resolution), and how Israel came into possession of that land. Also, testimony on the measures Israel took, both through military power and its legal system, to dispossess the Palestinians is highly germane to this case. This testimony is clearly relevant, helpful, and not cumulative, particularly in light of the numerous times the jury has been confronted with the phrases "long live Islamic and Arab Palestine from the river to the sea," "occupied territories of '48," "British Mandate," "Zionists," etc. While there are currently several exhibits in evidence that refer to Palestinian refugees, such as refugee travel documents, the jury has heard scant testimony about the definition of what the Palestinian refugees are. Further, there have been innumerable references to various "camps," without any detailed discussion of the fact that "camps" refers to refugee camps, which are scattered all throughout the Middle East.

1967 War and Subsequent Developments

In June 1967, Israel occupied the West Bank and Gaza Strip, hence the phrase "Occupied Territories," which the government has rendered into "the Territories." The government's own witness, Nissim Alyassaf, an official at the Israeli Ministry of the Interior, referenced "territories held by Israel," which could mean any land Israel holds. There has also been extensive testimony regarding events that took place in the West Bank and Gaza Strip prior to the arrival of the Palestinian Authority, and brief testimony regarding what the West Bank and Gaza Strip are and how they came to be that way is relevant, helpful to the

jury, and certainly not cumulative. In fact, such testimony is necessary to clear up the confusion created by the government's case, particularly in light of its decision to refer to the West Bank and Gaza Strip as "the Territories."

The First Intifada, the Oslo Accords, and the Second Intifada (the Al-Aqsa Intifada)

Interestingly, the government concedes the relevance of the above topics, and cannot possibly dispute Prof. Pappe's expertise on these subjects, given the vast amount he has written on them, but rather claims that such testimony is cumulative, in light of the testimony of both Matthew Levitt and Ziad Abu-Amr. In the first instance, Mr. Fariz should be entitled to present evidence through his own expert witnesses regarding these issues, and should not have to rely on the piecemeal and selective testimony presented by Dr. Levitt, the government's own expert. As for Dr. Abu-Amr, he was called to testify as a fact witness by the government regarding the production of a declaration he wrote for Mazen Al-Najjar during the latter's bond hearing in immigration court, and much of his testimony was taken up with that issue. To the extent that Dr. Abu-Amr testified about the above issues, it was elicited by the government tangentially to his role as a fact witness and lacked the depth of information necessary to fully respond to Levitt's incomplete treatment of the issue. As the summary of Prof. Pappe's testimony makes clear, many important, relevant, and helpful facts have not been presented to the jury to assist their complete and accurate understanding of the First Intifada, the Oslo Accords, and the Al-Aqsa Intifada.

Testimony Regarding the PIJ

The government's main contention is that Prof. Pappe's testimony would be cumulative with respect to the PIJ. While Mr. Fariz contends that he should be entitled to present testimony from his own experts on areas that have been previously covered by government witnesses, as Prof. Pappe's summary makes clear, he would testify as to many matters that have not yet been raised in this case that are clearly relevant. For example, while so far only Kerry Myers has testified regarding Izz al-Din Al-Qassam, the historic figure, his testimony was incorrect - he testified he was a Palestinian, when he was in fact Syrian - and there has been no substantive testimony as to who Al-Qassam was, what he did, or when he did it, particularly in light of the fact that the government has painted him as a sinister figure. The testimony of Prof. Pappe accurately describing the role of Izz al-Din Al-Qassam will provide the jury with a complete picture of his use as a historical figure.

With respect to other aspects of the PIJ's history, the jury has heard testimony that Fathi Shikaki and Abdel Aziz Awda were deported from the Occupied Territories, but such testimony needs to be put in the proper context. The nature of this testimony necessarily leaves the jury with an impression of the event which negatively taints Shikaki and Awda. In 1988, the year both men were deported, the United Nations Security Council, with the United States voting in the affirmative, issued several resolutions condemning the Israeli practice of deporting Palestinians from the Occupied Territories as being in contravention of international law. The jury should be allowed to consider all facets of this historical event. The government opened the door by presenting this information and should not be allowed

to now object to the relevancy of contrary information if available. Through Prof. Pappe, Mr. Fariz can do so. Also, while Dr. Levitt has testified regarding the mass deportation by Israel of Palestinian Islamists, 50 of whom were PIJ members, including Abdallah Al-Shami, to Lebanon in December 1992, the jury has not heard that the United States voted to join in a United Nations Security Council Resolution condemning the deportations and demanding the immediate return of these deportees. *See, e.g.*, gov. ex. 511. Again, the government has opened the door and the jury is entitled to hear all competent evidence concerning this issue including, but not limited to, how the Israeli government treats all Palestinian resistance to its occupation as terrorism, military or otherwise.

In addition, the numerous PIJ statements in evidence make reference to many historical events that have yet to be explained to the jury. For example, while Matthew Levitt briefly discussed the massacre of Palestinian worshipers by an Israeli settler in Hebron in February 1994, he did not discuss the central role this act and its fallout played in ushering in the role of the suicide bombings against locations inside Israel. The statements themselves also repeatedly make reference to certain historical events that are not explained properly. While the government has focused on the so-called Battle of Al-Shuja'iya, the testimony to date has been incomplete and one-sided. Mr. Fariz is entitled to clarify and complete these accounts.

Turning to the meaning of the phrase "martyrs and detainees," Prof. Pappe, who both speaks Arabic and has studied the phenomenon of Palestinian political movements' use of the terms "martyr" and "detainee," is qualified to testify as to the meaning of these words.

Testimony regarding Israeli actions towards members of the PIJ is relevant and helpful to the jury, particularly in light of the fact that the government continues to insist that Abdel Aziz Awda is a member of the PIJ, despite the fact that he was allowed to return to Gaza by the Israelis, and that it has information in its possession that he left the PIJ in 1997. The relevance of this historical fact has not been fully described through government witnesses. Prof. Pappe can testify that a) Israel controls the entry and exit of all persons into and out of the Occupied Territories; b) Israel maintains an exhaustive record of all PIJ members in the Occupied Territories; and, c) it would never allow a PIJ member to travel abroad and/or return to the Gaza Strip. These facts are relevant to place into context Mr. Fariz's and others' actions with respect to the Mazen Al-Najjar hearings.

Finally, as early as late 2002, the PIJ leadership has begun to make it known that it would agree to a long-term ceasefire with Israel, provided the latter ends its occupation of the West Bank and Gaza Strip, thereby signifying that its real goal is to end that occupation, and not to drive the Israelis out of the Middle East, which is more properly considered political posturing. Such testimony is in opposition to that which the government has argued, presented and relies upon. Prof. Pappe can counter the government's theory by elaborating and clarifying the testimony of Ziad Abu-Amr concerning these matters.

B. Raji Sourani

1. Qualifications

With respect to the contention that Mr. Sourani is not qualified to give testimony on the areas covered by his summary, he is among the world's leading human rights lawyers and

has been recognized as such by the Robert F. Kennedy Memorial and the International Commission of Jurists. Both his summary and CV lay out in considerable detail his extensive experience in representing individuals before Palestinian, Israeli, and international tribunals; his many presentations the world over; and, his extensive work in the field of NGO's in Palestine, one of which is the Elehssan Charitable Association. On that latter note, the government has failed to notice that in the summary of Mr. Sourani's qualifications, it mentions his vast experience "monitoring and drafting reports on the nature and status of non-governmental organizations (NGO's) operating in the Gaza Strip." Further, the government also neglects to mention the fact he was instrumental in consulting with the Palestinian Legislative Council and providing it with comments on the Palestinian NGO law, under which Elehssan is registered and licensed, as Ziad Abu-Amr briefly noted.

2. Reliability

As should be evident from both Mr. Sourani's CV and the summary of his expert testimony, he has had considerable experience in Palestinian, Israeli, and international tribunals as an advocate. In that capacity, he has been exposed to all Israeli and Palestinian laws and Israeli military orders that concern the status of the Gaza Strip. After the establishment of the Palestinian Authority in 1994, Mr. Sourani has both studied and advocated for all laws that establish and protect Palestinian civil society and its representative institutions. With respect to the field of NGO's, Mr. Sourani helped prepare a detailed commentary on the draft Palestinian NGO law, and had engaged in continuous monitoring of that law's provisions after its ratification by the Palestinian Legislative

Committee. Further, in his position as Director of the Palestinian Centre for Human Rights, he monitors the compliance of NGO's, including charities, with the provisions of the NGO law. Mr. Sourani also has experience in defending Islamic charities from measures taken to freeze their assets based on alleged ties to terrorist groups, as his role as an advocate on behalf of Al-Salah Islamic Association, which is detailed in his summary, quite clearly demonstrates.

3. Mr. Sourani's Proposed Testimony is Relevant, Helpful to the Jury, and not Cumulative

Mr. Sourani's testimony regarding the legal status and history of the Gaza Strip is clearly relevant and has not been testified to as of yet. He has the necessary expertise as both a lecturer and advocate to address these topics in reliable detail before jury. As mentioned above, the government's witnesses have yet to address the status of the Gaza Strip during the time period relevant to this case, and Mr. Sourani, who as a lawyer dealt with the all the legal restrictions in place on Gazans, is in the ideal position to address these issues before the jury. While there has been some testimony on the extreme poverty and dire need for social welfare and charitable efforts in Gaza, Mr. Sourani can address this situation from a position of authoritative thoroughness, and describe how this situation has come into being. In particular, as an expert in Palestinian NGOs, he can describe the specific operations of the Elehssan Charitable Association and its programs.

As a native speaker of Arabic and expert on Palestinian civil and political society, Mr. Sourani will provide testimony on the use by Palestinians in Gaza of the terms "martyr"

and "detainee," both in society at large, and as employed by the PIJ, given his representation of numerous individuals charged by both the Israeli authorities and the Palestinian Authority with being members of that group. As a frequent commentator on Palestinian political society, Mr. Sourani is also uniquely placed to offer expert testimony on the meaning of these words as used by political factions like the PIJ, about whom he frequently provides analysis.

Finally, with respect to the issue of Israeli treatment of Palestinian detainees, this summary was provided in case it became relevant. Currently, however, Mr. Fariz does not intend to elicit such testimony.

III. Conclusion

Mr. Fariz respectfully requests that this Honorable Court deny the government's Renewed Motion and Memorandum of Support of Motion to Exclude Expert Testimony of Ilan Pappe and Raji Sourani, or in the Alternative, for a Daubert Hearing (Doc. 1365).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of October, 2005, a true and correct copy of the foregoing has been furnished by CM/ECF, to Walter Furr, Assistant United States Attorney; Terry Zitek, Assistant United States Attorney; Cherie L. Krigsman, Trial Attorney, U.S. Department of Justice; Alexis L. Collins, Trial Attorney, U.S. Department of Justice; William Moffitt and Linda Moreno, counsel for Sami Amin Al-Arian; Bruce Howie, counsel for Ghassan Ballut; and to Stephen N. Bernstein, counsel for Sameeh Hammoudeh.

/s/ Wadie E. Said
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